

1 THE HONORABLE BENJAMIN H. SETTLE

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6 UNITED STATES DISTRICT COURT  
7 WESTERN DISTRICT OF WASHINGTON  
8 AT TACOMA

9 SHAMARICA D. SCOTT and LINDA A.  
10 WILSON, individually,

11 Plaintiffs,

12 v.

13 THE EVERGREEN STATE COLLEGE;  
14 JENNIFER SCHOOLER, and DOES I  
15 through X, inclusive, employees of The  
16 Evergreen State College,

17 Defendants.

Case No. 3:17-cv-05823-BHS

**PLAINTIFF SHAMARICA SCOTT'S  
MOTION FOR PARTIAL SUMMARY  
JUDGMENT RE: AFFIRMATIVE  
DEFENSES**

**NOTE ON MOTION CALENDAR:**  
Friday, December 21, 2018

Without Oral Argument

18 **I. RELIEF REQUESTED**

19 Plaintiff ShaMarica D. Scott respectfully requests that the Court grant her motion for  
20 partial summary judgment and strike Defendants The Evergreen State College's and Jennifer  
21 Schooler's (collectively "Defendants") affirmative defenses, which are unsupported by the  
22 evidence in this case or otherwise do not constitute valid affirmative defenses to Scott's claims.

23 Summary judgment in Scott's favor on Defendants' unsupported defenses is  
appropriate to narrow the issues in this case before trial. "One of the principal purposes of the  
summary judgment rule is to isolate and dispose of factually unsupported claims or defenses"

1 upon a proper showing that there is no genuine, triable issue of material fact. *Celotex Corp. v.*  
2 *Catrett*, 477 U.S. 317, 323-24; 327 (1986). Thus, Plaintiff Scott asks that the Court grant  
3 summary judgment in her favor on the various affirmative defenses identified in this Motion.

## 4 **II. FACTUAL BACKGROUND**

### 5 **A. Defendants' Mistreatment of Scott**

6 Plaintiff Scott, an African American woman, was enrolled as a full-time student at The  
7 Evergreen State College (hereinafter "TESC") starting Fall of 2014. Declaration of ShaMarica  
8 D. Scott (hereinafter "Scott Decl."), ¶¶ 2-3. During the 2014–2015 school year, Scott was a  
9 member on TESC's Women's Basketball Team led by Head Coach Jennifer Schooler. *Id.* at  
10 ¶¶ 4-5. On a regular basis throughout the 2014–2015 basketball season, Scott endured racially-  
11 based discrimination, epithets, intimidation, and public humiliation perpetrated by Defendant  
12 Schooler. *Id.* at ¶ 6. Defendant Schooler, among other comments and behavior, repeatedly  
13 used the term "ghetto" in a derogatory fashion and/or with racial animus toward players on the  
14 Women's Basketball Team, including Scott. *Id.* at ¶ 7. Defendant Schooler has stated openly  
15 that TESC's Women's Basketball Team had more African American players than other teams  
16 in its league. Defendant Schooler also talked about how their team may be perceived  
17 differently by other teams because of the number of African American basketball players on  
18 the team. *Id.* at ¶ 8.

19 Athletes on TESC's Women's Basketball Team led by Head Coach Schooler, including  
20 Scott, witnessed incidents of Defendant Schooler's repeated vocal refusals to coach a team of  
21 "ghetto players." *Id.* at ¶ 9. Defendant Schooler also used race-baiting tactics to allegedly  
22 "motivate" her team with statements such as, "If you think that white teams feel intimidated  
23 by black players, they don't." *Id.* at ¶ 10; *see also* Deposition of Jennifer Ondon Schooler

1 (hereinafter “Schooler Dep.”, 206:10-19. As a result of Defendant Schooler’s racially-charged  
2 comments, Scott felt unwelcome and distraught. *Id.* at ¶ 11.

3 In addition to racist and derogatory comments, Defendant Schooler also made  
4 unwelcome and unsolicited comments about Scott’s sexual orientation and marital status.  
5 Scott, a female, identifies as gay/lesbian/homosexual. While Scott was on TESC’s Women’s  
6 Basketball Team, she had a female partner and referred to her as her wife. *Id.* at ¶ 12.  
7 Defendant Schooler asked on multiple occasions in a harassing and sarcastic manner in front  
8 of other team members, “Scott, is she *really* your wife, like *legally* your wife?” *Id.* at ¶ 13.

9 On more than one occasion, Defendant Schooler commented about Scott’s t-shirt from  
10 a Portland Gay Pride event during basketball practice such as “Scott, you and that f\*cking shirt  
11 again?!”; “Can you not wear something like that?!”; and “Do you have to wear something that  
12 says who you are?!” Defendant Schooler then forced Scott to wear the shirt inside-out.  
13 Defendant Schooler even commented that Scott “had the confidence to wear a shirt like that in  
14 public.” *Id.* at ¶ 14. Defendant Schooler’s constant berating and harassment of Scott caused  
15 her severe mental and emotional distress. *Id.* at ¶ 15. Defendant Schooler treated Scott  
16 differently than the other team members because of Scott’s race and sexual orientation. *Id.* at  
17 ¶ 16.

18 Plaintiff Scott reported these incidents to Defendant TESC. She first reported  
19 Defendant Schooler’s comments and behavior in December 2014 or January 2015 to Monica  
20 Heuer, the immediate preceding Head Coach who became the Assistant Director of Student  
21 Services and Assistant Director of Athletics/ Associate Director of Intercollegiate Athletics.  
22 *Id.* at ¶¶ 17-18. Heuer told Scott that she should not let the “small things affect” her, that she  
23

1 should focus on basketball, and that because she was a transfer/new student, she just needed to  
2 “figure out a way to communicate” with Defendant Schooler. *Id.* at ¶ 19.

3 In or around mid-May of 2015, Defendant Schooler terminated Scott from the  
4 Women’s Basketball Team. Defendant Schooler told Scott that “the team was heading in a  
5 different direction” and that she did not want Scott to be part of the team. *Id.* at ¶ 20; Schooler  
6 Dep., 231:12-14. She also instructed the team members to not communicate with Scott.  
7 Schooler Dep., 220:14-21.

8 In February 2016, Scott lodged a formal complaint against Defendant Schooler with  
9 TESC’S Affirmative Action & Equal Opportunity (“AA/EO”) Office, which is overseen by  
10 TESC’s Human Resources Services Department. Scott Decl., ¶ 21. Ms. Lorie H. Mastin,  
11 AA/EO Officer, conducted an investigation into Scott’s complaints. Mastin investigated  
12 claims of discrimination on the basis of race and sexual orientation. Mastin’s investigation  
13 found that as to the allegation of discrimination based on race, Defendant Schooler more likely  
14 than not violated TESC’s non-discrimination policy. Ms. Mastin also investigated Scott’s  
15 complaints of a hostile, intimidating, and offensive learning environment. *Id.* at ¶¶ 22-24.  
16 Mastin’s investigation found that as to the allegation of harassment, Defendant Schooler more  
17 likely than not violated TESC’s non-discrimination policy. Scott Decl., ¶ 25, Exh. A.

18 **B. Defense Counsel’s Refusal to Strike Affirmative Defenses**

19 On October 13, 2017, Plaintiff Scott filed her Complaint. Dkt. #1. On November 8,  
20 2017, Defendant TESC filed its Answer and Jury Demand asserting several affirmative  
21 defenses. Dkt. #11. On November 20, 2017, Defendant Jennifer Schooler filed her Answer  
22 and Jury Demand, also asserting several affirmative defenses. Dkt. #12.

1 On November 14 and 15, 2018, Scott, through counsel, took the deposition of TESC's  
2 30(b)(6) representatives. Declaration of Ada K. Wong (hereinafter Wong Decl."), ¶ 6. On the  
3 morning of the CR 30(b)(6) deposition, defense counsel, Mr. El Shon Richmond, stated for *the*  
4 *first time* that Defendants are not designating a representative to testify regarding some of the  
5 topics, including the facts supporting Defendants' affirmative defenses (despite Plaintiff's  
6 Notice of Deposition being served almost 4.5 months prior). *Id.* at ¶ 7. On November 15,  
7 2018, during a break in the middle of the deposition, counsel engaged in a 10-minute  
8 conversation regarding this newly raised issue. *Id.* at ¶ 8. Richmond disagreed that it  
9 constituted a Rule 26(i)/Fed. R. Civ. P. 37(a)(1) conference, and thus, one was scheduled for  
10 November 20, 2018. *Id.* Based on Richmond's statement to Wong on November 15, 2018  
11 that there is no one at TESC to testify to the facts supporting the various affirmative defenses  
12 without waiving work product or attorney-client privilege, on Monday, November 19, 2018,  
13 Wong e-mailed Richmond asking if Defendants were willing to strike any of their affirmative  
14 defenses, including, specifically, personal and subject matter jurisdiction, statute of limitations,  
15 waiver, estoppel, and failure to exhaust administrative remedies. *Id.* at ¶¶ 9-10.

16 On November 20, 2018, counsel engaged in a Fed. R. Civ. P. 37(a)(1) conference  
17 regarding Defendants' affirmative defenses (amongst other issues). Richmond stated that he  
18 will not be striking any affirmative defenses and he may "use them at summary judgment" and  
19 wanted to "reserve all affirmative defenses that may be developed down the line." He did state  
20 that he would check with his co-counsel regarding the non-party affirmative defense and let  
21 Wong know whether he was willing to strike that defense or name who the alleged at-fault  
22 non-party is by November 21, 2018. To date, Defendants have not stricken this defense or  
23 identified said non-party. *Id.* at ¶¶ 11-14.

1 The same day, via e-mail, Richmond confirmed Defendants' position that there is no  
2 one at TESC who has knowledge and/or can testify to the facts as outlined in Scott's Notice of  
3 Deposition of CR 30(b)(6) Representative regarding affirmative defenses besides himself and  
4 that he would not designate anyone to speak to the facts supporting the affirmative defenses.  
5 *Id.* at ¶ 10.

6 Given Defendants' refusal to strike any affirmative defenses, accompanying refusal to  
7 provide a representative to testify regarding any of their affirmative defenses, and defense  
8 counsel's affirmation that there is no one besides himself that has any knowledge regarding  
9 the affirmative defenses – and he, as counsel, is not allowed to testify in trial – the instant  
10 Motion shortly follows.

### 11 **III. ISSUE PRESENTED**

12 1. Whether the Court should strike the following affirmative defenses when  
13 Defendants have not provided any factual evidence or legal basis to support each defense:

14 Defense	TESC Defense No.	Schooler Defense No.
15 Failure to State a Claim	3.1	2
16 Subject Matter Jurisdiction	3.2	1
17 Personal Jurisdiction	3.3	
18 Compliance with RCW 4.92.100 and RCW 4.92.110	3.4	
19 Statute of limitations	3.5	
20 Waiver and/or Estoppel	3.6	
21 Exhaustion	3.7	
22 Qualified Immunity	3.8	5
23		

1	Vicarious Liability	3.9	
2	Sovereign Immunity	3.10	
3	Comparative Fault	3.12	3 (citing RCW 4.22.015)
4	Extreme or Outrageous Conduct	3.13	
5	Causation	3.14	
6	Mitigation of Damages	3.15	10
7	Individual Immunity		4
8	Reasonable Exercise of Judgment and Discretion by Authorized Public Officials Made in the Exercise of Governmental Authority		6
9	Immunity Based on Good Faith Performance of Duties		7
10	Legitimate, Non-discriminatory Reasons		8
11	Non-party at Fault		9

#### 14 IV. EVIDENCE RELIED UPON

15 In support of this Motion, Plaintiff ShaMarica D. Scott relies upon the following:

- 16 1. The Declaration of Ada K. Wong and the attachments thereto;
- 17 2. The Declaration of ShaMarica D. Scott and the attachments thereto; and
- 18 3. The files and pleadings herein.

#### 19 V. AUTHORITY AND ARGUMENT

##### 20 A. **Summary Judgment Standard**

21 Pursuant to Fed. R. Civ. P. 56(d), a plaintiff may seek partial summary judgment as to  
 22 certain affirmative defenses raised by defendants. *Mullaney v. Hilton Hotels Corp.*, 634 F.  
 23 Supp. 2d 1130, 1161 (D. Haw. 2009) (citing 5C Charles Alan Wright & Arthur R.

1 Miller, *Federal Practice and Procedure*, (3d ed. 2004) § 1380, p. 321 (explaining that Fed. R.  
2 Civ. P. 56(d) should be employed to grant partial summary judgment on affirmative defenses)).

3 Summary judgment is appropriate “if the pleadings, depositions, answers to  
4 interrogatories, and admissions on file, together with the affidavits, if any, show that there is  
5 no genuine issue as to any material fact and the moving party is entitled to judgment as a matter  
6 of law.” Fed. R. Civ. P. 56(c). The court must view the evidence in the light most favorable  
7 to the non-moving party. *Tzung v. State Farm Fire & Casualty Co.*, 873 F.2d 1338, 1339-40  
8 (9th Cir. 1989). To meet “its burden of production, the moving party must either produce  
9 evidence negating an essential element of the nonmoving party's claim or defense or show that  
10 the nonmoving party does not have enough evidence of an essential element to carry its  
11 ultimate burden of persuasion at trial.” *Nissan Fire & Marine Ins. Co. v. Fritz Cos.*, 210 F.3d  
12 1099, 1102 (9th Cir. 2000) (citing *High Tech Gays v. Defense Indus. Sec. Clearance Office*,  
13 895 F.2d 563, 574 (9th Cir. 1990). Once the “moving party carries its burden of production,  
14 the nonmoving party must produce evidence to support its claim or defense.” *Id.* at 1103 (citing  
15 *High Tech Gays*, 895 F.2d at 574). If the “nonmoving party fails to produce enough evidence  
16 to create a genuine issue of material fact, the moving party wins the motion for summary  
17 judgment.” *Id.* (citing *Celotex Corp.*, 477 U.S. at 322).

## 18 **B. This Court Should Strike Defendants’ Affirmative Defenses**

19 Summary judgment is appropriate because Defendants have failed to produce evidence  
20 sufficient to create a genuine issue of material fact regarding each affirmative defense.

### 21 **1. Failure to State a Claim**

22 Defendants each state as an affirmative defense that Plaintiffs failed to state a claim  
23 upon which relief may be granted. Fed. R. Civ. P. 8(a)(2) requires that each claim in a pleading

1 be supported by “a short and plain statement of the claim showing that the pleader is entitled  
2 to relief. . .” To satisfy Rule 8(a)(2), a complaint must contain sufficient factual content “to  
3 state a claim to relief that is plausible on its face. . .” *Bell Atlantic Corp. v. Twombly*, 550 U.S.  
4 544, 570 (2007); *see also Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (explaining that to satisfy  
5 Rule 8(a)(2), “a complaint must contain sufficient factual matter, accepted as true, to state a  
6 claim to relief that is plausible on its face”) (citation and internal quotation marks omitted).

7 A claim for relief is plausible on its face “when the plaintiff pleads factual content  
8 that allows the court to draw the reasonable inference that the defendant is liable  
9 for the misconduct alleged.” This standard does not rise to the level of a probability  
10 requirement, but it demands “more than a sheer possibility that a defendant has  
11 acted unlawfully.” In keeping with *Twombly*, the Supreme Court held in *Iqbal* that  
12 “[w]here a complaint pleads facts that are merely consistent with a defendant's  
13 liability, it stops short of the line between possibility and plausibility of entitlement  
14 to relief.”

15 *Landers v. Quality Commc'ns, Inc.*, 771 F.3d 638, 641 (9th Cir. 2014) (quoting *Twombly*, 550  
16 U.S at 678) (citations omitted).

17 Here, Scott has alleged the essential elements of each cause of action. Furthermore, as  
18 Defendants have failed to identify which of Scott's claims have not been properly stated and  
19 how, it is this affirmative defense – not Scott's cause of action – that falls far short of the  
20 applicable pleading standard. As such, both Defendants' affirmative defense of failure to state  
21 a claim should be stricken.

## 2. Subject Matter Jurisdiction

22 Defendants each state as an affirmative defense that Scott's claims lack subject matter  
23 jurisdiction. Pursuant to U.S.C. § 1331, federal district courts have jurisdiction over all civil  
actions arising under the Constitution, laws, and treaties of the United States. Pursuant to 28  
U.S.C. § 1343, federal district courts have original jurisdiction over (a) any civil action

1 authorized by law to be brought by any person to redress the deprivation, under color of any  
2 state law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity  
3 secured by the Constitution of the United States or by any Act of Congress providing for equal  
4 rights of citizens or of all persons within the jurisdiction of the United States; and (b) any civil  
5 action to recover damages or to secure equitable relief under any Act of Congress providing  
6 for the protection of the civil rights. Under 28 U.S.C. § 1367, a federal district court has  
7 supplemental jurisdiction over state law claims that are so closely related to federal law claims  
8 as to form the same case or controversy under Article III of the U.S. Constitution.

9 Here, the Court has subject matter jurisdiction over each of Scott's claims. Scott  
10 brought the underlying action primarily to redress a hostile educational environment pursuant  
11 to Title VI of the Civil Rights Act of 1964, § 601, 42 U.S.C. § 2000(d) *et. seq.*, and Title IX  
12 of the Education Amendments of 1972, 20 U.S.C. § 1681(a). The Court therefore has subject  
13 matter over these claims under 28 U.S.C. § 1331 and 28 U.S.C. § 1343. This Court has  
14 supplemental jurisdiction over Scott's state law claims under 28 U.S.C. § 1367 because each  
15 state cause of action arises under such similar facts and circumstances – the harassment Scott  
16 suffered as a member of TESC's Women's Basketball Team – that they can be said to form  
17 the same case or controversy. Though this Court has clear subject matter jurisdiction over  
18 Scott's federal causes of action and supplemental jurisdiction over her state causes of action,  
19 Defendants refused Scott's specific request to voluntarily strike jurisdiction as an affirmative  
20 defense. As such, both Defendants' affirmative defense of failure of subject matter jurisdiction  
21 should be stricken.

### 22 3. Personal Jurisdiction

23 Defendant TESC pleads "[f]ailure of personal jurisdiction" as an affirmative defense.

1 “[A] federal district court’s authority to assert personal jurisdiction in most cases is linked to  
2 service of process on a defendant ‘who is subject to the jurisdiction of a court of general  
3 jurisdiction in the state where the district court is located.’” *Walden v. Fiore*, 134 S. Ct. 1115,  
4 1121 (2014) (quoting Fed. R. Civ. P. 4(k)(1)(A)).

5 Congress has unambiguously abrogated state sovereign immunity for claims brought  
6 under Title IX and Title VI as part of the Rehabilitation Act Amendments of 1986, Pub. L. No.  
7 99-506, Tit. X, § 1003, 100 Stat. 1845 (1986):

8 (1) A State shall not be immune under the Eleventh Amendment of the Constitution  
9 of the United States from suit in Federal court for a violation of section 504 of the  
10 Rehabilitation Act of 1973 [29 U.S.C. 794], title IX of the Education Amendments  
11 of 1972 [20 U.S.C. 1681 et seq.], the Age Discrimination Act of 1975  
[42 U.S.C. 6101 et seq.], title VI of the Civil Rights Act of 1964  
[42 U.S.C. 2000d et seq.], or the provisions of any other Federal statute prohibiting  
discrimination by recipients of Federal financial assistance.

12 (2) In a suit against a State for a violation of a statute referred to in paragraph (1),  
13 remedies (including remedies both at law and in equity) are available for such a  
14 violation to the same extent as such remedies are available for such a violation in  
the suit against any public or private entity other than a State.

15 42 U.S.C. § 2000d-7; *see also Lane v. Pena*, 518 U.S. 187, 198 (1996) (indicating that  
16 Congress intended to abrogate the States’ Eleventh Amendment immunity for purposes of Title  
17 IX).

18 A state may waive its sovereign immunity. A “State’s freedom from suit without its  
19 consent does not protect it from a suit to which it has consented.” *Parden v. Terminal R. Co.*  
20 *of Ala. Docks Dept.*, 377 U.S. 184, 186 (1964); *see also Seminole Tribe of Fla. v. Florida*, 517  
21 U.S. 44, 65 (1996) (affirming “the States may waive their sovereign immunity”). “The state  
22 of Washington, whether acting in its governmental or proprietary capacity, shall be liable for  
23 damages arising out of its tortious conduct to the same extent as if it were a private person or

1 corporation.” RCW 4.92.090. This express waiver of sovereign immunity “makes the State  
2 presumptively liable for its alleged tortious conduct ‘in all instances in which the Legislature  
3 has *not* indicated otherwise.’” *Oda v. State*, 111 Wn. App. 79, 82 (2002) (quoting *Savage v.*  
4 *State*, 127 Wn.2d 434, 445 (1995)) (emphasis in original).

5 Here, the Court has personal jurisdiction over Defendant TESC, a Washington state  
6 college. Defendant TESC geographically resides within Washington state, and can and has  
7 been served in this matter in accordance with Fed. R. Civ. P. 4(k)(1)(A). As sovereign  
8 immunity is abrogated as to Defendant Scott’s Title VI and Title IX claims, this Court has  
9 personal jurisdiction over TESC for these claims. Under the broad waiver of sovereign  
10 immunity expressed in RCW 4.92.090, Defendant TESC cannot defeat personal jurisdiction as  
11 to Scott’s state law claims. Nonetheless, Defendants refused Scott’s specific request to  
12 voluntarily strike jurisdiction as an affirmative defense. As such, Defendant TESC’s  
13 affirmative defense of failure of personal jurisdiction should be stricken.

#### 14 **4. Compliance with RCW 4.92.100 and RCW 4.92.110**

15 Defendant TESC states as an affirmative defense that Scott did not comply with RCW  
16 4.92.100 and RCW 4.92.110. RCW 4.92.100 states that “[a]ll claims against the state. . . for  
17 damages arising out of tortious conduct, must be presented to the office of risk management.”  
18 RCW 4.92.110 requires that a claim subject to RCW 4.92.100 cannot be brought “until sixty  
19 calendar days have elapsed after the claim is presented to the office of risk management in the  
20 department of enterprise services.”

21 Here, Scott has complied with RCW 4.92.100 and RCW 4.92.110. On or about June  
22 12, 2017, Scott filed her tort claim. Wong Decl., ¶ 2. More than 60 days have elapsed since  
23 service of Scott’s tort claim, to which she never received a substantive response. *Id.* at ¶ 4.

1 Plaintiffs filed their initial Complaint in this matter on October 13, 2017. Dkt. #1. Therefore,  
2 Plaintiff Scott met the statutory requirements of RCW 4.92.100 and RCW 4.92.110 to proceed  
3 with the filing of this lawsuit, and this affirmative defense should be stricken.

#### 4 **5. Statute of Limitations**

5 Defendant TESC states as an affirmative defense that Scott’s “claims may be barred by  
6 the applicable statutes of limitations.” While “[n]either Title VI nor Title IX provide a  
7 limitations period expressly pertaining to judicial proceedings,” courts apply “state personal  
8 injury limitations periods to Title IX and Title VI claims.” *Lillard v. Shelby County Bd. of*  
9 *Educ.*, 76 F.3d 716, 728-29 (1996); *see also Johnson v. Railway Express Agency, Inc.*, 421  
10 U.S. 454, 462 (1975) (holding the controlling period would ordinarily be the most appropriate  
11 one provided by state law when there is no specifically stated or otherwise relevant federal  
12 statute of limitations for a cause of action). Pursuant to RCW 4.16.080(2), there is a “general  
13 three-year statute of limitations for personal injury actions” in Washington. *Antonius v. King*  
14 *County*, 153 Wn.2d 256, 261-62 (2004).

15 Here, Scott brought each of her causes of action within the applicable three-year statute  
16 of limitations. Scott was harassed during the 2014–2015 school year, and Defendant Schooler  
17 terminated Scott from TESC Women’s Basketball Team in or around mid-May of 2015. The  
18 Complaint in this matter was filed on October 13, 2017. The three-year statute of limitations  
19 applies to each of Scott’s causes of action, including her Title IX claim, her Title IX claim, and  
20 her state causes of action. Scott clearly filed the initial complaint within this period, but  
21 Defendant TESC refused Scott’s specific request to voluntarily strike statute of limitations as  
22 an affirmative defense. As such, Defendant TESC’s statute of limitations affirmative defense  
23 should be stricken.

1           **6.       Waiver and Estoppel**

2           Defendant TESC states as an affirmative defense that Scott’s “claims may be barred by  
3 waiver and/or estoppel.” The defenses of waiver and estoppel are summarized as follows:

4           A waiver is the intentional and voluntary relinquishment of a known right or such  
5 conduct as warrants an inference of the relinquishment of such right. It is a  
6 voluntary act which implies a choice, by the party, to dispense with something of  
7 value or to forgo some advantage. The one claimed to have waived a right must  
8 intend to relinquish such right, advantage or benefit and his actions must be  
9 inconsistent with any other intention than to waive them.

10          *Public Util. Dist. No. 1 of Lewis Cty. v. Washington Public Power Supply Sys.*, 104 Wn.2d 353,  
11 365 (1985) (citing *Bowman v. Webster*, 44 Wn.2d 667, 669 (1954)).

12          Equitable estoppel is defined as requiring three elements: (1) an admission,  
13 statement, or act inconsistent with the claim afterward asserted; (2) action by the  
14 other party on the faith of such admission, statement, or act; and (3) injury to such  
15 other party resulting from allowing the first party to contradict or repudiate such  
16 admission, statement, or act. In order to create an estoppel, it is necessary that the  
17 party claiming to have been influenced by the conduct or declarations of another  
18 was either destitute of knowledge of the true facts or without means of acquiring  
19 such facts.

20          *Id.* at 365.

21          Here, there is no evidence that Scott has waived any right or is subject to estoppel.  
22 Defendant TESC has not specified at any point what right Scott may have supposedly waived  
23 or to what actions estoppel might apply, has refused to produce a 30(b)(6) deponent to testify  
to this affirmative defense, and admits no witness with such knowledge exists. Despite there  
being no factual basis to support the affirmative defenses of waiver and estoppel, Defendant  
TESC refused Scott’s specific request to voluntarily strike these defenses. These defenses are  
both speculative at best and should be stricken.

24           **7.       Exhaustion of Administrative Remedies**

25          Defendant TESC states as an affirmative defense that Scott “may have failed to exhaust

1 administrative remedies.” RCW 4.92.100 and RCW 4.92.110 require that claims against the  
2 state may only be brought sixty days after they are presented to the office of risk management.  
3 A plaintiff is not required to exhaust administrative remedies prior to bringing a private claim  
4 for damages under Title VI or Title IX. *See Fitzgerald v. Barnstable Sch. Comm.*, 555 U.S.  
5 246, 255 (2009) (“Title IX has no administrative exhaustion requirement. . . Plaintiffs can file  
6 directly in court under its implied private right of action and can obtain the full range of  
7 remedies.”); *Cannon v. Univ. of Chicago*, 441 U.S. 677, 706-07 n.41 (1979) (“[W]e are not  
8 persuaded that individual suits are inappropriate in advance of exhaustion of administrative  
9 remedies.”).

10 Here, Scott has complied with RCW 4.92.100 and RCW 4.92.110, and there is no  
11 administrative exhaustion requirement for her Title VI and Title IX claims. Despite Scott’s  
12 clear compliance with all administrative exhaustion requirements, Defendant TESC refused  
13 Scott’s specific request to voluntarily strike exhaustion as an affirmative defense. Defendant  
14 TESC’s affirmative defense of failure to exhaust administrative remedies should be stricken.

## 15 **8. Qualified Immunity**

16 Defendants each assert qualified immunity as an affirmative defense. “Congress  
17 validly abrogated the states’ immunity from Title IX suits.” *Williams v. Bd. of Regents of Univ.*  
18 *System of Ga.*, 477 F. 3d 1282, 1301 (11th Cir.) (citing *Gebser v. Lago Vista Indep. Sch. Dist.*,  
19 524 U.S. 274, 284 (1998)). The same abrogation of immunity applies to Title VI suits. *See* 42  
20 U.S.C. § 2000d-7.

21 Here, neither Defendant may assert qualified immunity. TESC cannot assert qualified  
22 immunity as a defense to Scott’s Title VI and Title IX claims, as immunity has been abrogated  
23 for these claims. Regarding Scott’s state law claims against Defendant TESC, TESC has

1 waived immunity pursuant to RCW 4.92.090. Defendant Schooler cannot assert qualified  
2 immunity to any of Scott's claims brought against her. She is not a defendant to Scott's Title  
3 VI and Title IX claims, and can claim no immunity from the state law claims to which she is  
4 not a defendant. As such, Defendants' qualified immunity defense of should be stricken.

### 5 **9. Vicarious Liability**

6 Defendant TESC pleads as an affirmative defense that it "is not subject to vicarious  
7 liability." "Vicarious liability, otherwise known as the doctrine of *respondeat superior*,  
8 imposes liability on an employer for the torts of an employee who is acting on the employer's  
9 behalf." *Niece v. Elmview Group Home*, 131 Wn.2d 39, 48 (1997); *see also Robel v. Roundup*  
10 *Corp.*, 148 Wn.2d 35, 41-43 (2002) (holding employer vicariously liable for employee's  
11 intentional tort of outrage). "The State, as an employer, is liable for its employees' negligence  
12 to the same extent that a private employer would be. . ." *Rahman v. State*, 170 Wn.2d 810, 824  
13 (2011) (citing RCW 4.92.090).

14 Here, Defendant TESC is vicariously liable for the intentional torts and negligence  
15 committed by Defendant Schooler under the doctrine of *respondeat superior*. Defendant  
16 TESC was Defendant Schooler's employer at the time Schooler committed torts against Scott.  
17 Defendant Schooler was acting on Defendant TESC's behalf through various positions with  
18 the Women's Basketball Team, including Head Coach during the 2014-2015 basketball season  
19 when Scott was on the team. Defendant TESC is therefore vicariously liable for Defendant  
20 Schooler's torts, and this affirmative defense should be stricken.

### 21 **10. Sovereign Immunity**

22 Defendant TESC asserts it "is immune from suit under the Eleventh Amendment of the  
23 Constitution of the United States and principles of sovereign immunity." As discussed *supra*,

1 42 U.S.C. § 2000d-7 unambiguously abrogates state sovereign immunity for claims brought  
2 under Title VI and Title IX. In addition, the State is “liable for damages arising out of its  
3 tortious conduct to the same extent as if it were a private person or corporation.” RCW  
4 4.92.090.

5 Here, Defendant TESC may not assert state sovereign immunity under the Eleventh  
6 Amendment as a defense against any of Scott’s claims. Sovereign immunity is abrogated as  
7 to Scott’s Title VI and Title IX claims pursuant to 42 U.S.C. § 2000d-7 (and waived pursuant  
8 to RCW 4.92.090). Sovereign immunity has been waived as to Scott’s state law claims  
9 pursuant to RCW 4.92.090. As such, Defendant TESC’s affirmative defense of Eleventh  
10 Amendment sovereign immunity should be stricken.

#### 11 **11. Comparative Fault**

12 Defendants each assert the doctrine of comparative fault as an affirmative defense.  
13 Defendant Schooler states the “damages and/or injuries, if any, claimed by Plaintiff[] [Scott]  
14 were proximately caused or contributed to by the fault of Plaintiff[] [Scott] as defined by RCW  
15 4.22.015.” Citing no authority, Defendant TESC states Scott’s “injuries, if any, were a  
16 proximate result of their own actions thereby reducing any award or judgment against  
17 Defendant.” Washington has codified the doctrine of comparative fault as follows:

18 In an action based on fault seeking to recover damages for injury or death to person  
19 or harm to property, any contributory fault chargeable to the claimant diminishes  
20 proportionately the amount awarded as compensatory damages for an injury  
21 attributable to the claimant's contributory fault, but does not bar recovery. This rule  
applies whether or not under prior law the claimant’s contributory fault constituted  
a defense or was disregarded under applicable legal doctrines, such as last clear  
chance.

22 RCW 4.22.005.

23 “Fault” includes acts or omissions, including misuse of a product, that are in any

1 measure negligent or reckless toward the person or property of the actor or others,  
2 or that subject a person to strict tort liability or liability on a product liability claim.  
3 The term also includes breach of warranty, unreasonable assumption of risk, and  
4 unreasonable failure to avoid an injury or to mitigate damages. Legal requirements  
5 of causal relation apply both to fault as the basis for liability and to contributory  
6 fault.

7 A comparison of fault for any purpose under RCW 4.22.005 through 4.22.060 shall  
8 involve consideration of both the nature of the conduct of the parties to the action  
9 and the extent of the causal relation between such conduct and the damages.

10 RCW 4.22.015. “‘Fault,’ under chapter 4.22 RCW, does not include intentional acts or  
11 omissions.” *Tegman v. Accident & Medical Investigations*, 150 Wn.2d 102, 109 (2003).

12 Here, Defendants have no evidence to support their bare accusations that Scott was  
13 negligent or otherwise at fault, and, thus, there is no genuine issue of fact. No authority  
14 supports the proposition that comparative fault applies to a Title VI claim, a Title IX claim, or  
15 any intentional tort. Scott was a member of TESC’s Women’s Basketball Team coached by  
16 Defendant Schooler, and never acted negligently. *See* Scott Decl., ¶ 26. Defendants have  
17 repeatedly refused to designate a 30(b)(6) representative to testify otherwise and even admit  
18 that no such witness with knowledge of its affirmative defenses exists. Defendants have no  
19 factual evidence, but rather the mere accusation that Scott was somehow responsible for her  
20 own injuries. Absent any factual evidence, both Defendants’ affirmative defense of  
21 comparative fault should be stricken.

## 22 **12. Extreme or Outrageous Conduct**

23 Defendant TESC states as an affirmative defense that its “conduct was neither extreme  
nor outrageous.” “The tort of outrage requires the plaintiff to show: (1) extreme or outrageous  
conduct by the defendant; (2) that the conduct was intentional or reckless; and (3) that the  
plaintiff actually suffered severe emotional distress as a result.” *Robel v. Roundup Corp.*, 148

1 Wn.2d 35, 41 (2002) (citing *Dicomes v. State*, 113 Wn.2d 612, 630 (1989)). The extreme or  
2 outrageous conduct element “goes to the jury only after the court ‘determine[s] if reasonable  
3 minds could differ on whether the conduct was sufficiently extreme to result in liability.’” *Id.*  
4 (citing *Dicomes*, 113 Wn.2d at 630).

5 Here, reasonable minds could differ on whether Defendant Schooler’s conduct was  
6 sufficiently extreme to result in liability. Defendant Schooler subjected Scott to race and  
7 sexual orientation discrimination, epithets, intimidation, and public humiliation perpetrated on  
8 a regular basis throughout the 2014-2015 basketball season. Defendant Schooler repeatedly  
9 used the term “ghetto,” and commented on Scott’s sexuality and partner in a harassing and  
10 sarcastic manner. Defendant Schooler harassed Scott regarding Scott’s reference to her female  
11 partner as her wife, stating “Scott, is she really your wife, like legally your wife?!” Defendant  
12 Schooler even stated before forcing Scott to turn her t-shirt from a Portland Gay Pride inside-  
13 out: “Scott, you and that f\*cking shirt again?!”; “Can you not wear something like that?!”; and  
14 “Do you have to wear something that says who you are?!” Reasonable minds could find  
15 Defendant Schooler’s conduct – including her outburst combining profanity, derogatory  
16 sentiment about Scott’s gay pride t-shirt, and forcing her to turn her t-shirt inside-out – was  
17 extreme and outrageous and, the determination should be made by a jury. As such, Defendant  
18 TESC’s defense that its conduct was neither extreme nor outrageous should be stricken.

### 19 **13. Causation**

20 Defendant TESC states as an affirmative defense that it “did not cause Plaintiff[]  
21 [Scott’s] claimed damages,” and has failed to produce any evidence that supports this defense.

22 In the tort of negligence, “proximate cause in Washington entails the two elements of  
23 cause in fact and legal causation.” *Christen v. Lee*, 113 Wn.2d 479, 507 (1989). Cause in fact

1 refers to “the ‘but for’ consequences of an act—the physical connection between an act and an  
2 injury.” *Baughn v. Honda Motor Co., Ltd.*, 107 Wn.2d 127, 142 (1986). Legal cause is  
3 grounded in policy determinations as to how far the consequences of a defendant’s acts should  
4 extend.” *Schooley v. Pinch’s Deli Market, Inc.*, 134 Wn.2d 468, 478-79 (1998). Legal  
5 causation focuses on “whether, as a matter of policy, the connection between the ultimate result  
6 and the act of the defendant is too remote or insubstantial to impose liability.” *Id.* When “the  
7 facts are not in dispute, legal causation is for the court to decide as a matter of law.” *Id.*

8         Here, Defendants have no evidence that causation is lacking and fail to identify to  
9 which cause(s) of action this defense supposedly applies. Defendants declined to provide a  
10 30(b)(6) deponent to testify as to causation and admit that no such witness with knowledge of  
11 this affirmative defense exists. It is undisputed that Defendant Schooler directed the term  
12 “ghetto” and referenced “ghetto players” at Scott. Schooler Dep., 20:6-21:5. She also made  
13 comments including “Scott, is she really your wife, like legally your wife?” and “Scott, you  
14 and that f\*cking shirt again?! Can you not wear something like that! Do you have to wear  
15 something that says who you are?!” Scott Decl., ¶ 14. TESC’s AA/EO Officer Mastin  
16 conducted an investigation in response to Scott’s complaint of discrimination on the basis of  
17 race and sexual orientation and found that as to Scott’s allegations of discrimination based on  
18 race and a hostile, intimidating, and offensive learning environment, Defendant Schooler more  
19 likely than not violated TESC’s non-discrimination policy. Scott Decl., ¶¶ 21-25, Ex. A. But  
20 for Defendant Schooler’s constant berating and harassment, Scott would not have suffered  
21 severe mental and emotional distress. She also terminated Scott from the Women’s Basketball  
22 Team in 2015. *Id.* at ¶ 20; Schooler Dep., 230:9-21. The Court can and should hold as a matter  
23 of policy that the connection between Defendant Schooler’s actions and Scott’s damages is

1 substantial enough to impose liability. Furthermore, Defendant TESC is vicariously liable for  
2 Defendant Schooler's torts. *See Rahman v. State*, 170 Wn.2d. at 818-19; 24. Thus, Defendant  
3 TESC's causation affirmative defense should be stricken.

#### 4 **14. Mitigation of Damages**

5 Defendants claim that Scott failed to mitigate her damages as an affirmative defense,  
6 but have no evidence of any failure to mitigate damages. The defendant bears the burden of  
7 proof when asserting an unreasonable failure to mitigate. *Cox v. Keg Restr. U.S., Inc.*, 86 Wn.  
8 App. 239, 244-46 (1997) (rejecting the defendant's assertion that the plaintiff failed to mitigate  
9 his damages by failing to have a shunt removed from his brain to alleviate headaches, failing  
10 to take antidepressants and start physical therapy, delaying in consulting with a speech  
11 therapist, failing to seek psychotherapy, and failing to return to work). A defendant may not  
12 ask the jury to speculate. *See McLaughlin v. Cooke*, 112 Wn.2d 829, 837 (1989) (holding a  
13 trial verdict cannot be supported where "the jury must resort to speculation or conjecture").

14 Here, Defendants have produced no evidence to support the baseless claim that Scott  
15 has failed to mitigate her damages. Scott acted reasonably at all times, including the mitigation  
16 of her damages. Scott Decl., ¶ 26. Defendants have no evidence to meet their burden of  
17 demonstrating failure to mitigate damages, have refused to produce a witness to testify that  
18 Scott has failed to mitigate her damages, and admit no such witness exists. As such, this  
19 affirmative defense should be stricken.

#### 20 **15. Individual Immunity**

21 Defendant Schooler states as an affirmative defense that she "is immune from suit for  
22 the claims in Plaintiffs' Complaint," but cites no authority for this affirmative defense and fails  
23 to name any source of the supposed immunity. There is no applicable immunity for Defendant

1 Schooler for any of Scott's causes of action in which she is named as a defendant. Defendant  
2 Schooler's affirmative defense that she is immune from suit should be stricken.

3 **16. Reasonable Exercise of Judgment and Discretion**

4 Defendant Schooler states as an affirmative defense that "[a]ll actions of Defendant  
5 Schooler manifest a reasonable exercise of judgment and discretion by authorized public  
6 officials made in the exercise of governmental authority entrusted to them by law and are  
7 neither tortious nor actionable." Defendant Schooler cites no authority for this affirmative  
8 defense, and fails to identify any specific claim to which it supposedly applies. Defendant  
9 Schooler is not entitled to qualified immunity or any other form of immunity based on her  
10 "reasonable exercise of judgment and discretion" regarding Scott's state law claims against  
11 her. As such, this affirmative defense should be stricken.

12 **17. Immunity Based on Good Faith Performance of Duties**

13 Defendant Schooler pleads as an affirmative defense that she "at all times acted in good  
14 faith in the performance of her duties and is therefore immune from suit for the matter charged  
15 in Plaintiff[] [Scott's] Complaint." Defendant Schooler cites no authority for this affirmative  
16 defense and fails to clarify for which specific causes of action she is supposedly immune from  
17 suit. Defendant Schooler is not entitled to qualified immunity or any other form of immunity  
18 regarding Scott's state law claims against her, and this affirmative defense should be stricken.

19 **18. Legitimate, Non-discriminatory Reasons**

20 Defendant Schooler asserts as an affirmative defense that "[t]here are legitimate, non-  
21 discriminatory reasons, which are proper and legal, for [her] actions." Defendant Schooler  
22 cites no authority for this vague and ambiguous affirmative defense. The standard for  
23 Defendant Schooler's conduct regarding Scott's intentional infliction of emotional distress

1 claim is whether there was extreme or outrageous conduct by the defendant that was  
2 intentional or reckless. *Robel*, 148 Wn.2d at 41. For negligence causes of action, the standard  
3 is “failure to exercise ordinary care.” WPI 10.01. “Ordinary care means the care a reasonably  
4 careful person would exercise under the same or similar circumstances.” WPI 10.02.

5 Here, there is no basis in fact or law supporting Defendant Schooler’s affirmative  
6 defense. Whether she had “legitimate, non-discriminatory reasons” for her actionable conduct  
7 is irrelevant to Scott’s intentional infliction of emotional distress and negligent infliction of  
8 emotional distress causes of action to which she is a defendant. Furthermore, there is no  
9 evidence to support this affirmative defense. Because this affirmative defense is irrelevant as  
10 asserted and inapplicable to the causes of action to which Defendant Schooler is a defendant,  
11 in addition to there being no evidence to support it, this affirmative defense should be stricken.

12 **19. Non-party at Fault**

13 Finally, Defendant Schooler states as an affirmative defense that “[t]he damages and/or  
14 injuries, if any, were caused by the fault of a non-party who may become apparent during  
15 discovery for purposes of RCW 4.22.070(1).” RCW 4.22.070(1) provides “[i]n all actions  
16 involving fault of more than one entity, the trier of fact shall determine the percentage of the  
17 total fault which is attributable to every entity which caused the claimant’s damages except  
18 entities immune from liability to the claimant under Title 51 RCW.”

19 Here, Defendant Schooler has not identified any non-party at fault in this matter and has  
20 no evidence to support this defense. On November 20, 2018, Plaintiff’s counsel specifically  
21 requested defense counsel for information – a name – regarding this defense. To date, no non-  
22 party has been identified, despite Defendants having ample time and opportunity to obtain such  
23 information through discovery, including various depositions. Defense counsel also refused

1 to provide a 30(b)(6) witness to testify as to this defense and admits no witness with any such  
2 knowledge exists. As no evidence of a proper non-party defendant exists, this affirmative  
3 defense should be stricken.

4 **VI. CONCLUSION**

5 With this Motion for Partial Summary Judgment, Plaintiff Scott seeks to narrow the  
6 issues for trial. Plaintiff Scott respectfully requests this Court grant an order striking the  
7 affirmative defenses in each of Defendant's Answers as outlined above. Defendants have  
8 failed to produce any evidence supporting any of the identified affirmative defenses. As there  
9 is neither evidentiary nor legal support for these identified affirmative defenses, Plaintiff Scott  
10 respectfully requests that this Court strike each of them.

11 **VII. PROPOSED ORDER**

12 A proposed order seeking the relief requested is attached.

13 **DATED** November 29, 2018.

14 **AKW LAW, P.C.**

15 /s/ Ada K. Wong

16 Ada K. Wong, WSBA #45936  
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23

**CERTIFICATE OF SERVICE**

The undersigned certifies under the penalty of perjury under the laws of the State of Washington that I am now and at all times herein mentioned, a citizen of the United States, a resident of the State of Washington, over the age of eighteen years, not a party to or interested in the above-entitled action, and competent to be a witness herein.

On November 29, 2018, I caused a copy of the foregoing **PLAINTIFF SHAMARICA SCOTT'S MOTION FOR PARTIAL SUMMARY JUDGMENT RE: AFFIRMATIVE DEFENSES** to be served on the parties listed below in the manner specified below:

El Shon D. Richmond Janay Ferguson Suzanne LiaBraaten ATTORNEY GENERAL OF WASHINGTON / Torts Division 7141 Cleanwater Drive SW P.O. Box 40126 Olympia, WA 98504 <a href="mailto:Elshonr@atg.wa.gov">Elshonr@atg.wa.gov</a> <a href="mailto:JanayF@atg.wa.gov">JanayF@atg.wa.gov</a> <a href="mailto:stefanyl@atg.wa.gov">stefanyl@atg.wa.gov</a> <a href="mailto:daniellew@atg.wa.gov">daniellew@atg.wa.gov</a> <a href="mailto:TOROlyEF@atg.wa.gov">TOROlyEF@atg.wa.gov</a> <a href="mailto:maritzao@atg.wa.gov">maritzao@atg.wa.gov</a> <i>Attorneys for Defendants</i>	<input type="checkbox"/>	VIA FACSIMILE
	<input type="checkbox"/>	VIA FIRST CLASS U.S. MAIL
	<input type="checkbox"/>	VIA MESSENGER/HAND DELIVERY
	<input checked="" type="checkbox"/>	<b>VIA E-MAIL/E-FILE</b> <b><i>Per 1/17/18 Stipulation</i></b> <b><i>Regarding Electronic Service</i></b> <b><i>Pursuant to Fed. R. Civ. P. 5</i></b>
Linda A. Wilson 2504 17 <sup>th</sup> Ave NW Olympia, WA 98502 <i>Plaintiff</i>	<input type="checkbox"/>	VIA FACSIMILE
	<input checked="" type="checkbox"/>	<b>VIA FIRST CLASS U.S. MAIL</b>
	<input type="checkbox"/>	VIA MESSENGER/HAND DELIVERY
	<input type="checkbox"/>	VIA E-MAIL/E-FILE

Dated this 29<sup>th</sup> day of November, 2018, at Mountlake Terrace, Washington.

/s/ Kaila A. Eckert  
Kaila A. Eckert, Paralegal